PENANG PORT COMMISSION

v.

KANAWAGI SEPERUMANIAM (NO 3)

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
SITI NORMA YAAKOB JCA
ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO: W-02-252 OF 1994]
8 JUNE 1998

CIVIL PROCEDURE: *Summary judgment - 'Cause' against application for summary judgment - Whether could be shown by way of affidavit evidence as well as by statement of defence - Whether affidavits deposed by officers of appellant - Whether there were triable issues - Rules of the High Court 1980, O. 14 rr. 2(2), 4(1), (2)*

The respondent had been dismissed from the appellant's employment and had sued the appellant for the dismissal. By his reamended statement of claim, and subsequently by his summons-in-chambers application for summary judgment, the respondent sought declarations *inter alia* that his termination was *ultra vires* the Penang Port Commission Act 1955 and was in breach of the rules of natural justice. The respondent also alleged, *vide* his second prayer in the summons-in-chambers, that the appellant ought to have confirmed him as its traffic supervisor, since he had acted in that capacity for two years, and since he had also obtained a 'pass' in the Bahasa Malaysia subject at the 1976 Sijil Pelajaran Malaysia Examinations ('SPM') thereby satisfying the appellant's condition for confirmation to the said post.

The appellant had practically contested every inch of the respondent's claim, and had in particular tendered affidavit evidence, through the affidavits of its solicitors and the personal manager of Penang Port Sdn Bhd, *inter alia*, that the respondent at the material time did not possess a 'pass' in Bahasa Malaysia at the SPM/Malaysian Certificate of Education Examinations ('MCE'). The facts showed however that, on the issue of whether the respondent had a 'pass' in Bahasa Malaysia at the SPM/MCE level, conflicting evidence were adduced before the court, in that a letter from the Penang Education Department dated 21 May 1977 confirmed that the respondent had obtained a 'pass' in the July 1976 Bahasa Malaysia examination at SPM, whilst another letter dated 4 April 1994 asserted that the department had no record of the respondent passing the Bahasa Malaysia subject in that examination. These apart, there was also a letter from the Examinations Syndicate which stated that the respondent had

passed the Bahasa Malaysia subject at the said examination with an 8S result, but was unqualified to receive the certificate due to his failure to attend the oral test thereof.

The learned judge, having heard the summon-in-chamber on 18 July 1994, granted an order in terms of the first, third and fourth prayers thereof. On 20 October 1994, before the Deputy Registrar could assess the damages in respect of the said third prayer, the learned judge heard the second prayer in the summons-in-chambers and consequently granted an order in terms of the prayer. It was apparent that in coming to his decision thus, the learned trial judge took the view, *inter alia*, that the appellant's statement of defence was a bare denial, that the appellant could not improve on the pleadings through affidavit evidence, that in any case the affidavits by the personal manager of Penang Port Sdn Bhd and the solicitors aforesaid were not deposed to by the appellant's officers and ought to be disregarded, and that there ought to be finality to litigation in clear and obvious cases such as the one before him. The appellant appealed, and before the learned judge herein, questions arose as to: (i) whether 'cause' against an applicaton for summary judgment could or could not be shown by way of affidavit evidence; and (ii) whether there were triable issues which ought to be disposed of in a full trial.

Held:
Per Abdul Malek Ahmad JCA

[1] In an application for summary judgment, O. 14 r. 4(1) of the Rules of the High Court 1980 ('RHC') applies and it is to the effect that a defendant may show cause against the application by affidavit or otherwise to the satisfaction of the court. That means that cause against the application can be shown by affidavit or in a statement of defence. Just as a statement of defence can be improved upon by amendment, it is an even stronger reason under the rule for a statement of defence to be clarified through an affidavit.

[2] The affidavits of the personal manager of Penang Port Sdn Bhd clearly stated that he was the personal manager of the appellant before it was corporatised and that he had access to the personal file of the respondent. The facts also showed that the solicitors had been directed by the appellant to make a search as regards the 1976 SPM examinations and by letter dated 4 April 1994, the Penang Education Department stated that it had no record of the respondent passing the Bahasa Malaysia subject in the examination held in Penang. These affidavits were quite in order especially in the light of O. 14 r. 2(2) of the RHC.

[3] Order 14 r. 4(1) of the RHC says that a defendant may show cause against an application for summary judgment by affidavit, and r. 4(2) says that "rule 2(2) applies for the purposes of this rule as it applies for the purposes of that rule". This by itself raises a triable issue. Likewise, a triable issue had also arisen in respect of the trial judge's finding that there was no variation of terms to the invitation, offer and acceptance of the post of traffic supervisor to the respondent.

[4] There were a number of issues here which should be ventilated at a full trial and the learned judge was in error in granting summary judgment.

[Appeal allowed; order for summary judgment set aside.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden telah diberhentikan daripada penggajian perayu dan telah mendakwa perayu bagi pemecatan tersebut. Melalui pernyatan tuntutan terpinda semulanya, dan kemudiannya melalui permohonan saman dalam kamarnya untuk penghakiman terus, responden cuba mendapatkan pengisytiharan antara lainnya bahawa penamatan perkhidmatan beliau adalah *ultra vires* Akta Suruhanjaya Pelabuhan Pulau Pinang 1955 dan telah memungkiri kaedah-kaedah keadilan asasi. Responden juga mendakwa, melalui pohonan keduanya dalam saman dalam kamar, secara pentingnya, bahawa perayu sepatutnya telah mengesahkan jawatan beliau sebagai penyelia trafiknya, oleh kerana beliau telah menyandang kedudukan tersebut selama dua tahun, dan oleh kerana beliau telah juga berjaya memperolehi pangkat Lulus dalam mata pelajaran Bahasa Malaysia pada peperiksaan Sijil Pelajaran Malaysia Tahun 1976 ('SPM') yang dengan itu memenuhi syarat perayu untuk pengesahan dalam jawatan tersebut.

Perayu boleh dikatakan telah mencabar setiap daripada tuntutan responden, dan telah secara khususnya mengemukakan keterangan afidavit, melalui afidavit-afidavit peguamcaranya dan Pengurus Kakitangan Penang Port Sdn Bhd. antara lainnya, bahawa responden pada waktu yang material itu tidak mempunyai kelulusan dalam Bahasa Malaysia di peringkat SPM/Malaysian Certificate of Education Examination ('MCE'). Fakta-fakta namun begitu menunjukkan bahawa, mengenai isu samada responden telah mempunyai kelulusan Lulus dalam Bahasa Malaysia di peringkat SPM/MCE, keterangan yang bertentangan telah dikemukakan di hadapan Mahkamah, iaitu surat daripada Jabatan Pelajaran Pulau Pinang bertarikh 21 Mei 1997 mengesahkan bahawa responden telah memperolehi pangkat lulus dalam peperiksaan Bahasa Malaysia bulan Julai 1997 di peringkat SPM sedangkan satu lagi surat yang lain bertarikh 4 April 1994 menegaskan bahawa Jabatan tersebut tidak mempunyai sebarang rekod mengenai responden yang lulus mata pelajaran Bahasa Malaysia di peperiksaan itu. Selain daripada ini terdapat juga sepucuk surat daripada

Sindiket Peperiksaan yang menyatakan bahawa responden telah lulus mata pelajaran Bahasa Malaysia di peperiksaan tersebut dengan keputusan 8S, tetapi tidak layak untuk memerima sijil tersebut kerana kegagalannya untuk hadir ujian lisannya.

Hakim yang bijaksana, setelah mendengar saman dalam kamar pada 18 Julai 1994 telah memberikan perintah menurut pohonan-pohonannya yang pertama, ketiga dan keempat. Pada 20 Oktober 1994, sebelum Timbalan Pendaftar boleh menaksirkan gantirugi berhubung dengan pohonan ketiga, hakim yang bijakasana telah mendengar pohonan kedua dalam saman dalam kamar dan berikutan itu telah memberikan perintah seperti yang dipohon oleh pohonan tersebut. Ianya jelas bahawa dalam mencapai keputusannya sedemikian, hakim perbicaraan yang bijaksana, anatara lainnya, berpendapat bahawa pernyataan pembelaan perayu adalah suatu penafian semata-mata, bahawa perayu tersebut tidak dapat memperbaiki pliding-pliding tersebut melalui keterangan afidavit, bahawa dalam sebarang kes afidavit-afidavit oleh Pengurus Kakitangan Penang Port Sdn Bhd dan peguamcara yang tersebut di atas telah tidak dideposkan oleh pegawai-pegawai perayu dan seharusnya tidak dihiraukan, dan bahawa seharusnya terdapat kemuktamadan kepada litigasi dalam kes-kes yang jelas dan ketara seperti yang terdapat di hadapan beliau. Perayu telah merayu dan di hadapan hakim yang bijaksana di sini, persoalan-persoalan berbangkit berhubung dengan (i) samada 'kausa' terhadap sesuatu permohonan untuk penghakiman terus boleh atau tidak boleh ditunjukkan melalui keterangan afidavit (ii) samada terdapatnya isu-isu yang boleh dibicarakan yang mana haruslah dilupuskan dalam perbicaraan penuh.

Diputuskan:
Oleh Abdul Malek Ahmad HMR

[1] Dalam permohonan untuk penghakiman terus, A. 14 k 4(1) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') terpakai dan adalah berkaitan dengannya bahawa defendan boleh menunjukkan kausa terhadap permohonan tersebut melalui afidavit atau sebaliknya demi kepuasan mahkamah. Itu bermakna bahawa kausa terhadap permohonan tersebut boleh ditunjukkan melalui afidavit atau dalam satu pernyataan pembelaan. Hanya sepertimana satu pernyataan pembelaan boleh disempurnakan melalui pindaan, ianya merupakan alasan yang lebih kukuh bagi pernyataan pembelaan itu di perjelaskan melalui sesuatu afidavit.

[2] Afidavit-afidavit Pengurus Kakitangan Penang Port Sdn Bhd jelas menyatakan bahawa beliau adalah Pengurus Kakitangan perayu sebelum ianya diswastakan dan bahawa beliau mempunyai akses kepada fail peribadi responden. Fakta-fakta juga menunjukkan bahawa peguamcara tersebut telah diarahkan oleh perayu untuk membuat carian berhubung

peperiksaan SPM 1976 dan melalui surat bertarikh 4 April 1994, Jabatan Pelajaran Pulau Pinang menyatakan bahawa mereka tidak mempunyai sebarang rekod mengenai responden yang dikatakan telah lulus mata pelajaran Bahasa Malaysia dalam peperiksaan tersebut yang telah diadakan di Pulau Pinang. Afidavit-afidavit ini adalah akan teratur khususnya memandangkan A. 14 k. 2(2) KMT.

[3] Aturan 14 k. 4(1) KMT menyatakan bahawa defendan boleh menunjukan sebab terhadap sesuatu permohonan untuk penghakiman terus melalui afidavit dan k. 4(2) menyatakan bahawa k. 2(2) terpakai bagi tujuan-tujuan kaedah ini kerana ianya terpakai bagi tujuan-tujuan kaedah itu. Ini dengan sendirinya membangkitkan isu yang boleh dibicarakan. Begitu juga, satu isu yang boleh dibicarakan telah juga berbangkit berhubung dengan keputusan hakim perbicaraan bahawa tidak terdapatnya sebarang perubahan terma-terma kepada pelawaan, tawaran dan penerimaan jawatan penyelia trafik kepada responden.

[4] Terdapatnya beberapa isu-isu yang seharusnya disuarkan di perbicaraan penuh dan hakim yang bijaksana salah dalam memberikan penghakiman terus.

[Rayuan dibenarkan; perintah untuk penghakiman terus diketepikan.]

Legislation referred to:
Rules of the High Court 1980, O. 14 rr. 2(2), 4(1), (2)

For the appellant - Raja Aziz Addruse (Ramsum Ho Chii Huey with him); M/s Lim Huck Aik & Co
For the respondent - RR Sethu (Balwant Singh with him); M/s Khana & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S6-22-208-87]

Reported by WA Sharif

JUDGMENT

Abdul Malek Ahmad JCA:

Pursuant to the court order dated 19 August 1993, the prayers in the reamended statement of claim dated 1 September 1993 were for a declaration that the defendant's Disciplinary Board action in terminating the services of the plaintiff was *ultra vires* the Penang Port Commission Act 1955 (hereinafter 'the Act') and therefore null and void and invalid, and further or alternatively for a declaration that the defendant's Disciplinary Board has no power to dismiss the plaintiff and its action in dismissing the plaintiff is null and void and invalid.

The plaintiff had also asked for a declaration that the defendant's act in terminating the plaintiff was in breach of the rules of natural justice and therefore null and void and invalid, for a declaration that the plaintiff in having obtained a Pass in the Bahasa Malaysia subject at the 1976 Sijil Pelajaran Malaysia (hereinafter "SPM") examination has satisfied the defendant's condition stipulated in their letter dated 26 July 1975 to be confirmed as a traffic supervisor, and for an order that the defendant pay all arrears of salary from the date of dismissal to the date of reinstatement within thirty days of being served with the order.

Apart from that, he had also claimed damages for distress, anguish, anxiety, inconvenience, embarrassment and humiliation, loss of seniority in service and loss of promotional chances and consequential higher earnings, interest on the above sum at 8% per annum till the date of realisation, costs, and any other relief the court may deem fit.

By summons in chambers filed on 14 February 1994, the plaintiff applied for the following orders:

(a) for a declaration that the defendant's Displinary Board action in terminating the plaintiff's services by letter dated the 7th May 1985 was *ultra vires* the Act and therefore null and void and invalid,

(b) for a declaration that the plaintiff in having obtained a Pass in the Bahasa Malaysia subject at the 1976 SPM examination has satisfied the defendant's condition stipulated in their letter dated the 26th July 1975 to be confirmed as a traffic supervisor in the defendant's services,

(c) for an order that damages sustained by the plaintiff be assessed by the Deputy Registrar and be paid by the defendant to the plaintiff together with interest at 8% per annum till the date of realisation,

(d) costs of this application be paid by the defendant, and

(e) such further or other relief that the Court deems fit to grant.

Learned counsel for the appellant, who was the defendant in the court below, pointed out to us that essentially the prayers in the summons in chambers were the same as those in the statement of claim. The learned trial judge had granted the order in terms of the first, third and fourth prayers in the summons in chambers on 18 July 1994 but before the Deputy Registrar could assess the damages in respect of the third prayer in the summons in chambers, the parties had gone before the learned trial judge on 20 October 1994 to seek clarification on his earlier orders.

When he found that they were ready to proceed on the second prayer in the summons in chambers, he had heard the application there and then after which he granted the order in terms of the second prayer in the summons in chambers on which order this appeal is based.

Learned counsel for the plaintiff, who is the respondent before us, referred to para. 13 of the reamended statement of claim and said that the respondent was dismissed by letter dated 7 May 1953. In effect, the relevant dismissal letter states that the respondent had not reported for duty since 1 March 1985 despite being directed to do so and his explanation had not been accepted. As such, he was dismissed with effect from the 1 March 1985.

It was the respondent's contention that he was a traffic supervisor from July 1976 but the appellant not confirm him in that capacity. As such, the respondent refused to continue working as a clerk whereupon he was dismissed.

The relevant minutes of the appellant's Service Committee's meeting on 20 May 1975, as regards the appointment of traffic supervisors, state that after interviewing the candidates they had decided that the respondent was qualified to be selected but he did not possess a Pass in Bahasa Malaysia at SPM/ Malaysian Certificate of Education ("hereinafter MCE') level. However, since he was a serving officer in the appellant and as an incentive to other officers serving with them to better themselves, the members of the Service Committee recommended that he be appointed as a temporary traffic supervisor until he obtained a Pass in Bahasa Malaysia at SPM/MCE level to be held in November 1975. In the meantime, he is to be paid an acting allowance to be fixed by the management. Accordingly, learned counsel for the respondent brought to our attention the letter from the Education Department in Penang dated 21 May 1977 which confirmed that the respondent had obtained a Pass in the July 1976 Bahasa Malaysia examination at SPM level. There is, however, another letter from the Examinations Syndicate dated 7 April 1994 which says that the respondent passed Bahasa Malaysia subject with an 8S result in the July 1976 examination but he was not present for the oral test and was not, therefore, qualified to receive the certificate.

Learned counsel for the appellant reiterated that they were not appealing on the first prayer in the summons-in-chambers but was more concerned as to whether damages should be based on whether the respondent was a clerk or a traffic supervisor. They maintained that the respondent was dismissed as a clerk since he was only acting as a traffic supervisor putting as evidence letters from the appellant dated 26 July 1975, 27 April 1977, 17 May 1979, 31 May 1979, 4 September 1979 and 18 October 1979 to prove the point. We were also referred to the personal option form filled in by the respondent on

28 June 1977 under Service Circular No. 2 of 1977 addressed to the Staff Management of the appellant where the respondent had described himself as General Clerk. It is pertinent to observe that in a similar personal option form dated 18 January 1975 the respondent had put his post as Mobile Clerk, Traffic. The respondent's solicitor's letter dated 25 May 1977 also confirms that the respondent had not been appointed as a traffic supervisor despite having acted in that capacity for two years.

Learned counsel for the respondent argued that all the relevant documents pertaining to traffic supervisors including leave entitlement and duty rosters showed that the respondent was a traffic supervisor. The quick reply from learned counsel for the appellant was that the documents do not indicate that he was holding the post substantively but only in an acting capacity.

Finally, there is the 1979 SPM results dated 8 February 1980 which showed that the respondent had obtained a Pass in the Bahasa Malaysia examination but had failed the oral test. It would appear from the documents available in the appeal record that the respondent had taken the relevant examination more than once but all with the same results. We are, however, only concerned with the 1976 SPM examination as stated in the summons in chambers. Learned counsel argued that whether or not he passed the oral examination was not the criteria for his appointment as traffic supervisor earlier and should not be made a condition now.

We had analysed the affidavits and carefully considered the arguments of both learned counsel. We had also gone through the judgment of the learned trial judge. It was his finding that the statement of defence was a bare denial and the appellant cannot improve on his pleadings through affidavit evidence. With respect to the learned trial judge, we are of the view that in an application for summary judgment, O. 14 r. 4(1) of the Rules of the High Court 1980 (hereinafter "the Rules") applies and it is to the effect that a defendant may show cause against the application by affidavit or otherwise to the satisfaction of the Court. That means that cause against the application can be shown by affidavit or in a statement of defence. Just as a statement of defence can be improved upon by amendment, it is an even stronger reason under the rule for the statement of defence to be clarified through an affidavit.

He was also of the opinion that the three affidavits by the appellant were not deposed to by its officers as two were by the Personnel Manager of Penang Port Sdn. Bhd. and one by the solicitor in charge of the matter. The affidavits of the Personnel Manager of Penang Port Sdn. Bhd. clearly states that he was the Personnel Manager of the appellant before it was corporatised and accordingly, he had access to the personal file of the respondent. As for the

solicitor, he had been directed by the appellant to make a search as regards the 1976 SPM examination and by letter dated 4 April 1994, the Penang Education Department stated that they had no record of the respondent passing the Bahasa Malaysia subject in that examination held in Penang. We took the view that the affidavits were quite in order, especially in the light of O. 14 r. 2(2) of the Rules which states, for applications for summary judgment, that unless the Court otherwise directs, an affidavit for the purposes of that rule may contain statements of information or belief with the sources and grounds thereof. Order 14 r. 4(1) of the Rules says that a defendant may show cause against such an application by affidavit, and r. 4(2) says that "Rule 2(2) applies for the purposes of this rule as it applies for the purposes of that rule." This, by itself, raises a triable issue.

Apart from that, the learned trial judge held that there could not be a subsequent variation of terms to the invitation, offer and acceptance of the post of traffic supervisor to the respondent as when all these took place, it was not then a condition that the respondent had to pass the oral test as well. This, to our minds, is also a triable issue.

We were also perturbed by the question of delay in filing the application for summary judgment although the learned trial judge held there was no delay. The writ was filed on 14 May 1987 and the statement of claim was amended on 2 April 1992 and reamended on 1 September 1993. On 9 December 1993, the appellant applied to set aside the reamended statement of claim but this was dismissed on 7 February 1994. Only then did the respondent file the application for summary judgment on 14 April 1994 which is one month short of seven years after the writ was filed.

The learned trial judge's view was that there should be a finality to litigation in clear and obvious cases. To us, this I was not the situation here as there are a number of issues which should be ventilated at a full trial.

Our final analysis was that the learned trial judge was clearly in error when he granted summary judgment for the second prayer in the summons-in-chambers.

We accordingly allowed the appeal with costs here and below, set aside the order for summary judgment on the second prayer in the summons-in-chambers, ordered an early trial and refunded the deposit to the appellant.